Hon. Julie Spector, Chief Civil Judge
Applic. for Writ of Review or Certiorari
Noted for: 1/10/2019

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

CITY OF SEATTLE, SEATTLE POLICE DEPARTMENT, Petitioner, vs. SEATTLE POLICE OFFICERS' GUILD, ARBITRATOR JANE WILKINSON and ADLEY SHEPHERD Respondents.	No. 18-2-57201-1 SEA **PETITIONER'S REPLY TO RESPONDENT SPOG'S OPPOSITION TO APPLICATION FOR WRIT OF REVIEW OR CERTIORARI**

Officer Adley Shepherd punched a handcuffed suspect in the face so hard that he fractured her skull. An arbitrator found that Officer Shepherd violated SPD's use-of-force policy but reinstated his employment. Numerous sources establish and reflect an explicit, well-defined, and dominant public policy against the excessive use of force in policing. The arbitrator's reinstatement of Officer Shepherd violated that public policy, and this Court should issue a writ to allow for review, and, ultimately, vacation, of the arbitrator's decision on these public policy grounds.

The Seattle Police Officers' Guild's ("SPOG") arguments in opposition to the City of Seattle, Seattle Police Department's ("SPD") writ application are unavailing. SPOG argues that SPD is not entitled to a statutory writ of review, and that a constitutional writ of certiorari is not

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automatic. Regardless of how SPD's writ application is styled, a writ should issue in a case involving an alleged violation of public policy because, "like any contract, an arbitration decision arising out of a collective bargaining agreement can be vacated if it violates public policy." *Int'l Union of Operating Eng'rs, Local 286 v. Port of Seattle*, 176 Wn.2d 712, 721, 295 P.3d 736 (2013) ("*Operating Eng'rs*"). In the absence of the issuance of a writ, this Court will have no mechanism to review the record and determine whether the arbitrator's decision violated the public policy against the use of excessive force in policing.[1]

SPOG puts the cart before the horse and asks this Court, at the writ application stage, to determine that the arbitrator's award did not violate any explicit, well-defined, and dominant public policy. That is for the Court to decide after the writ has been granted, with the benefit of the full record from below. To deny SPD the opportunity to demonstrate that the arbitrator's award was contrary to public policy, at the writ application stage, would be premature.

SPOG's attempt to distinguish *Operating Eng'rs* also falls flat. SPOG claims that the Washington Law Against Discrimination ("WLAD"), the public policy at issue in *Operating Eng'rs*, is a "specific and unique public policy," and that *Operating Eng'rs'* inquiry "was specific to the affirmative duty created by WLAD" and is not applied in other contexts. Opp. Br. at 8-9. SPOG cites no authority for this proposition other than *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 219 P.3d 675 (2009), a case decided nearly four years before *Operating Eng'rs*. Certainly there is no language in *Operating Eng'rs* itself that suggests its reasoning is limited to cases involving the WLAD. Therefore, contrary to SPOG's claims, the

[1] SPOG cites *Dep't of Soc. & Health Servs. v. State Personnel Bd*., 61 Wn. App. 778, 812 P.2d 500 (1991) ("*DSHS*") as an example of a superior court's decision not to exercise its inherent power of review of an arbitration decision being affirmed. *DSHS* did not involve an argument that the arbitrator's award violated public policy.

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proper inquiry is whether there is an explicit, well-defined, and dominant public policy, and whether the arbitrator's punishment is so lenient that it will not deter future violations of the public policy at issue. *See Operating Eng'rs*, 176 Wn.2d at 721-24.

SPOG's claim that SPD has not identified an explicit, well-defined, and dominant public policy is dependent upon SPOG's misinterpretation of *Operating Eng'rs*. SPOG argues that none of the sources of public policy identified by SPD establish a public policy against reinstatement of an officer who violated SPD's use-of-force policy. But, as noted above, this is not the proper inquiry.[2] Under *Operating Eng'rs*, the superior court must first determine whether there is an explicit, well-defined, and dominant public policy. 176 Wn.2d at 721-23. The WLAD supplies such a public policy against workplace discrimination. *Id*. Similarly, the sources cited by SPD supply a public policy against the excessive use of force in policing. This public policy is enshrined in the Fourth Amendment, the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (current version at 34 U.S.C. § 12601 (2017)), and the case law. *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (claims of excessive use of force by police are analyzed under the Fourth Amendment's reasonableness standard); *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993) (use of excessive force by officers in effecting an arrest clearly proscribed by the Fourth Amendment); *Staats v. Brown*, 139 Wn.2d 757, 774, 991 P.2d 615 (2000) ("Use of excessive force to accomplish an arrest . . . clearly violates the Fourth Amendment."); *see also City of Richfield v. Law Enforcement Labor Servs., Inc*., 910 N.W. 2d

[2] In fact, the union in *Operating Eng'rs* made a similar argument as SPOG does here: it claimed that the WLAD did not express an explicit or well-defined public policy because it did not enumerate specific penalties for specific acts of discrimination. 176 Wn.2d at 722-23. The Court rejected this argument, noting that "the idea of assigning specific disciplines without taking into account the surrounding circumstances is particularly inappropriate" and would destroy the public policy exception. *Id*. at 723. SPOG's argument that none of the sources SPD cites specifically state that an officer employing excessive force must be terminated, and therefore those sources do not establish an explicit, well-defined, and dominant public policy, is similarly unavailing.

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465, 474-75 (Minn. Ct. App. 2018) ("It is undisputed that in Minnesota, there is a well-defined and dominant public policy against police officers using excessive force."), *rev. granted* June 19, 2018.[3] This public policy is further reflected in the other sources and authorities cited by SPD: the Consent Decree (entered into pursuant to the U.S. Department of Justice's findings that SPD had violated the Fourth Amendment), and SPD's own use-of-force policies[4] (revised pursuant to the Consent Decree); *see also* DRB Decision (Exh. A to Tilstra Decl.) at 13 (arbitrator noting SPD's policies reflect the constitutional use-of-force standard set out in *Graham*). Initiative 940, while not explicitly referencing excessive use of force, contains a requirement that police officers receive violence de-escalation training, which reflects and supports the public policy against excessive use of force. These authorities establish and corroborate an explicit, well-defined, and dominant public policy against the excessive use of force in policing.

After an explicit, well-defined, and dominant public policy has been established, the superior court must determine whether the arbitration award was so lenient that it violates the public policy. 176 Wn.2d at 723-24. The court need not, and should not, decide this issue at the writ application stage. But the facts of this case show that reinstatement of Officer Shepherd violates the public policy against excessive use of force in policing. The arbitrator found that Officer Shepherd's punch violated the prohibition on use of force on handcuffed suspects (DRB Decision at 21), a policy

[3] SPOG attempts to distinguish *City of Richfield* by noting its holding that "the relevant inquiry is not whether the police officer's conduct violates a well-defined and established public policy, but whether the arbitration award reinstating the police officer violates public policy." 910 N.W.2d at 476. This is precisely the inquiry set forth by *Operating Eng'rs*. SPOG also cites to an earlier case, *City of Minneapolis v. Police Officer's Fed'n of Minneapolis*, 566 N.W.2d 83, 89 (Minn. Ct. App. 1997), for the proposition that there is no public policy stating that an officer must automatically be discharged if he or she is involved in an excessive force incident. SPD does not argue that termination should be automatic in all excessive force cases, but that reinstatement in this case violates the public policy against excessive use of force in policing.

[4] The fact that some other officers found to have violated SPD's use-of-force policies were not terminated does not change the analysis. SPD does not argue that termination should always occur when an officer violates its use-of-force policies. The instances cited by SPOG (Opp. at 10-12) are factually different from this case, and do not negate the public policy against excessive use of force in policing.

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explicitly expressed in the Consent Decree as a necessary component of compliance with 42 U.S.C. § 14141 and the Fourth Amendment. *See* Consent Decree (Exh. D to Tilstra Decl.) at 13. The arbitrator further found that Officer Shepherd was "adamant" and "passionate" that he had done nothing wrong, but that it was "quite possible, if not probable" that a lengthy suspension would tell him to use the least amount of appropriate force in the future. *Id*. at 26-27. Forcing SPD to reinstate a police officer who is "passionate" that punching a handcuffed suspect is not wrong violates the public policy against the excessive use of force in policing. A 15-day suspension is simply too lenient to deter future violations of this public policy, under the specific facts and circumstances of this case. This Court should grant SPD's application for a writ.

DATED this 9th day of January, 2019.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on this date, I electronically filed the foregoing document with the Clerk of the Court using the ECR E-filing Application, and caused a true and correct copy of that same document to be served on the following in the manner(s) indicated:

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DATED this 9th day of January, 2019, at Seattle, Washington.

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